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December 23, 2002

By Electronic Filing

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338; *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 96-98; *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147; *Verizon Petition for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2) of the Commission's Rules,* CC Docket No. 96-149**.**

Dear Ms. Dortch:

This letter responds, on behalf of AT&T Corp., to the November 22, 2002 *ex parte* letter submitted in the above-captioned proceedings by Willam P. Barr, Executive Vice President and General Counsel of Verizon Communications (hereinafter "*Barr Broadband Letter*"). Mr. Barr purports to provide a unified "framework for addressing each of the key broadband issues pending before the Commission."[1] In fact, the letter is little more than a compilation of the *ad hoc* proposals that comprise the Regional Bell Operating Companies' vast deregulation wish list. These radical proposals would, collectively, remove virtually all Commission (and state) oversight of the Bells' "broadband" services, which the Bells are quick to suggest include far more than the DSL-based services upon which their advocacy has focused and, indeed, can be expected to include virtually *all* services and facilities provided over the Bells' networks, even those "that traditionally were thought of as narrowband."[2] These are accordingly matters of

[1] *Barr Broadband Letter* at 1.

[2] *Barr Broadband Letter* at 2.

great importance, on which rhetoric, hollow promises and threats, and superficial appeals to playground justice must give way to careful and reasoned application of the governing legal and economic principles to the marketplace facts and record evidence.

There is obviously no one principle that could resolve each and every one of the disparate legal and policy issues raised in the *Wireline Broadband*, *ILEC Broadband Dominance*, *Triennial UNE Review* and *272 Separate Affiliate* proceedings – indeed, some of the Bells' proposals must be rejected out of hand as flatly inconsistent with the particular statutory provisions that govern those proposals (but not others). There is, however, one guiding principle that has always properly informed the Commission's deliberations on issues like these and that is of critical importance in these proceedings: regulation that is appropriately designed and implemented to constrain the abuse of market power is manifestly procompetitive, and mindless *de*regulation in the face of real risks of market power abuse will do great harm to the public interest.

When that well-established analytical framework is applied to the Bells' broadband services, it is quite clear that certain sharing and other obligations remain necessary to prevent the Bells from exercising market power and doing great harm to consumers and competition. Indeed, acceptance of the Bells' blanket deregulation proposals would put an end to entire categories of competitors, causing major setbacks not only to broadband competition and choice, but to burgeoning voice competition and choice as well.

That does not mean, of course, that *all* existing regulation remains necessary or that the Commission should ignore claims that specific regulations do more harm than good. For example, although the basic *Computer Inquiries* obligation to offer standalone broadband transport on nondiscriminatory terms clearly remains necessary, there may be room for improvement to (or even repeal of) some of the specific *Computer Inquiries* rules. The Commission must, however, decline the Bells' invitation to ignore market power and important differences among regulations, services and local market conditions in search of crude across-the-board "solutions" that simply cannot be justified.

The Bells' respond to criticism of their proposals with cries that the Commission must do *something* to promote broadband. Such rhetoric could hardly justify the repeal of entire categories of existing market power-based regulation in the face of enduring market power and the clear contrary requirements of the Communications Act and settled law. And the Commission *is* doing something – in fact, quite a lot – to promote broadband and, in particular, to encourage the development of the *multiple* broadband platforms that are the surest route to a true market-based regime. *See*, *e.g.*, News Release, *FCC Begins Inquiry Regarding Additional Spectrum For Unlicensed Devices* (Dec. 11, 2002).

No one can legitimately accuse the Commission of shirking its responsibilities to promote advanced services; to the contrary, the Commission has been at the forefront of broadband efforts, not only through its own formal proceedings, but also through cooperative discussions with other regulators and stakeholders, and Commission sponsorship of conferences and panels for frank debate of key issues. As one such forum, the October 7, 2002 *en banc* broadband hearing, recently made clear, any suggestion that the "brake" on deployment of broadband services to all Americans is market power-based regulation of the Bells is entirely baseless. Rather, the Commission and others must continue to encourage more attractive broadband content and applications and new platforms that will spur greater *demand* for broadband services.[3] In short, there is plenty that the Commission can do (and is doing) to promote broadband without sacrificing principled decision-making.

Indeed, the only course in these proceedings that could lead to legitimate criticism of the Commission's broadband efforts (and reversal on appeal) would be to depart from well-established principles and clear statutory guideposts. Faithful adherence to the law, sound economics and the facts *will* produce far less deregulation than the Bells seek. But that is the right answer today, because it is the only answer consistent with the overriding public interest in protecting consumers and competition from the abuse of market power.

Contrary To The Bells' Superficial Analyses, Very Real Risks Of Market Power Abuse Justify Continued Regulation Of The Bells' Broadband Services. The Bells' pleas to avoid Title II regulation of their broadband services rest almost entirely on the observation that in many areas their retail DSL offerings face competition from cable modem services that are not today subject to Title II sharing obligations. That duopoly and principles of "regulatory parity," the Bells contend, demand across-the-board repeal of all regulation of all wireline broadband services provided in all areas to all customers (carriers, ISPs, residential consumers and businesses alike). There are a number of problems with this simple-minded approach.

First, as the Commission has already tentatively concluded, the Bells' *retail* broadband Internet services, like their retail cable modem service counterparts, are information services that are not even subject to Title II regulation.[4] Thus, retail "regulatory parity" already exists.

The principal question at hand is whether there is a continuing need for existing *wholesale* access obligations. And when the well-established economic tools used to assess whether there is a danger of market power abuse are applied to *that* issue, it is clear that existing

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[3] October 7, 2002 *En Banc* Hearing, Tr. at 51 (Nalebuff) ("The problem with broadband is simply there aren't any good killer applications. We had one. It was called Napster, and it was unfortunately illegal."); *id*. ("So we don't have any existing [killer applications], nor is it clear that there are any obvious applications coming up in the future. I read a report from Brookings which said there would be $500 billion in productivity gains from broadband. I think if you believe that, I have dot com stock to sell you."); *id.* at 61 (Varian) (citing lack of demand for broadband because touted applications "never materialized").

[4] *Wireline Broadband Classification NPRM* ¶ 17, CC Docket No. 02-33 (Rel. Feb. 15, 2002).

wholesale access obligations remain necessary. It is simple fact that neither competitive carriers nor ISPs do today, or will in the near future, have effective alternatives to the Bells' broadband facilities. Cable companies do not even provide the type of voice and high speed data access required by competitive carriers. And although some cable companies have begun providing access to some ISPs in some markets, there is no cable alternative for most ISPs in most markets. Because there is no place else for ISPs or competitive carriers to turn, the Bells plainly have the ability to demand unreasonable and anticompetitive access terms (or to deny access altogether).

The Bells argue that the existence of effective *retail* competition removes their incentives to abuse that power. Because retail customers value ISP choice, the argument goes, the Bells (like their cable competitors) will have every incentive to grant third party access to their broadband facilities upon reasonable terms and conditions simply to please and attract retail consumers to their networks. But that ignores the Bells' unique anticompetitive incentives and the overwhelming record evidence in these proceedings that demonstrates that existing and foreseeable levels of retail competition between cable and DSL will *not* persuade the Bells to accommodate all reasonable access requests from their competitors.

The Bells have fundamentally skewed incentives when it comes to broadband services. As the Bells have acknowledged, broadband services "*are increasingly likely to cannibalize the traditional services offered by ILECs.*"[5] For example, one "cost[] of DSL is the fact that "about 30% of new DSL subscribers give up a second phone line" which earns the Bell higher margins than DSL.[6] Similarly, DSL is a substitute for premium-priced T1, fractional T1, and ISDN services that the Bells provide to small businesses.[7]

[5] Reply Comments of BellSouth, Att. 1, NERA Reply Report ¶ 167, CC Docket No. 01-338 (filed July 17, 2002) ("BellSouth Triennial Review Reply").(emphasis added). *See also* Goldman Sachs, *Telecom Services*, at 15 (June 11, 2002) ("[A] negative side effect of adding a DSL subscriber is the potential loss of a second line that the customer had previously subscribed to. *SBC estimates that as much as one-half of customers with second lines that sign up for DSL service disconnect their second lines, Verizon estimates that this figure is closer to three-quarters.* . . . Second lines generate only $25 per month in revenue and come at a very low incremental cost to the provider, implying very high returns. Alternatively, DSL requires significant upfront acquisition costs as well as infrastructure costs. . . . *A DSL subscriber often comes at the expense of a disconnected second line, which means $25 in high-margin revenues are lost.*") (emphasis added).

[6] BellSouth Triennial Review Reply Comments, Harris Reply Dec., Att. 2 (DSL Business Case) at 3.

[7] Yankee Report (August 2002).

Because of this "cannibalization" effect, the Bells' profit maximizing price for DSL will not be the competitive price, but a much higher price. Bell DSL pricing is thus a balancing act – high enough to slow the migration from legacy Bell services to DSL, but not too high to cause mass customer migration to cable. And the Bells' ability to retain and gain customers notwithstanding 25 percent DSL price hikes that were not matched by cable confirms that the Bells do unquestionably have the power to sustain enormous price increases even where they face cable competition.[8] That is unsurprising given that cable modem services are not perfect substitutes for the Bells' DSL services (*e.g.*, most cable providers cannot match the Bells' voice/DSL bundle) and that duopoly can rarely be counted on to produce competitive market incentives.[9] For these reasons, when the Bells raise prices for DSL, they both increase the margins on that service *and* diminish the incentives of current second line/T1 subscribers to switch to DSL, thereby increasing revenue from those legacy services (and overall Bell profits).[10] These same incentives mean that the Bells have no interest in offering competitively-priced access to their last-mile broadband transport, either for competitive carriers or ISPs. The Bells know that if they give reasonable wholesale access, competitors using that access will both undercut the Bells' bloated DSL charges and "overpromote" DSL in ways that could only accelerate the Bells' loss of second line and T1/ISDN subscribers.

Moreover, broadband and narrowband services are provided over the same wires, and there are clear economies of scope in both production and demand. Offering both voice and DSL service over the same Bell-provided loops may be the best, and perhaps only, means of profitably entering some local markets. At a minimum, denying competitive carriers the ability to offer DSL service forecloses competitive carriers from competing for the growing number of

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[8] After the collapse of the data LEC industry, the Bells responded by raising their prices by 25% and ending the prior practice in which their retail services that used the lowest-speed Internet access service had been priced at the same level as cable modem service. *See* Comments of AT&T, Willig Dec. ¶¶ 21-23, 102-13, CC Docket No. 01-337 (filed Mar. 1, 2002) ("AT&T ILEC Broadband Dominance Comments").

[9] *See EchoStar-DirecTV Merger Order*, 17 FCC Rcd. 20559, ¶ 103 (2002) ("[E]xisting antitrust doctrine suggests that a merger to duopoly or monopoly faces a strong presumption of illegality."); *id.*, Statement of Chairmen Powell ("At best, this merger would create a duopoly in areas served by cable; at worst it would create a merger to monopoly in unserved areas. Either result would decrease incentives to reduce prices, increase the risk of collusion, and inevitably result in less innovation and fewer benefits to consumers. That is the antithesis of what the public interest demands.").

[10] It presumably for this reason that the Bells have begun to state publicly that DSL is priced "too low." Vikas Bajaj, *Phone, Broadband Prices Too Low, Verizon Exec Says*, Dallas Morning News (June 5, 2002) ("Digital subscriber lines, which cost about $50 a month today, should be 40 percent to 50 percent more expensive, [Verizon's Vice Chairman and President] told reporters at a news conference.").

customers that demand voice/data services over a single line from a single provider – as the Bells' economists have recognized.[11] Denying reasonable requests for broadband access thus has the added benefit to the Bells of protecting their voice monopolies.

Remarkably, the Bells have recently provided economic testimony that *confirms* that they are earning monopoly profits for DSL. In contesting the evidence in AT&T's recent petition showing that the Bells are earning extraordinarily high and increasing rates of return on special access, the Bells responded that these returns were skewed due to the fact that the Bells book DSL revenues and costs in their interstate accounts. They argue that although the Bells can provide DSL at very low incremental costs, they have experienced "dramatic increases in . . . earnings attributable to these [DSL] services," and these "dramatic" profits have been driving up their reported rates of return.[12] In competitive markets, of course, revenues would be driven towards costs and the fact that the Bells' DSL profits have continued to increase "dramatic[ally]" despite substantial price increases confirms that a cable/DSL duopoly will not constrain the Bells' market power.

Second, even the Bells' duopoly premise is false in many important respects. "[T]he geographic scope of the market for broadband access is local,"[13] and, as the Commission has recognized, what is true "for any technology" in the early stages of development is particularly true for broadband: deployment "is not uniform across the nation."[14] And in some residential areas, cable service is not available to anyone.[15] For example, "forty-five percent of Californians that live in cities with broadband service have DSL service as their only broadband option."[16]

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[11] *See* Verizon Triennial Review Comments, Kahn-Tardiff Reply Dec. ¶ 39 (stating that "competitors will need to offer both voice and broadband services" and that they have "long agreed with [AT&T's] position that carriers need to offer packages of services if they are to compete successfully.").

[12] Opposition of Verizon, Attach., Kahn-Taylor Dec., RM No. 10593, at 15 (filed Dec. 2, 2002) ("Kahn-Taylor Dec.").

[13] BellSouth ILEC Dominance Reply Comments, Harris Dec. ¶ 6 (filed Apr. 22, 2002).

[14] *Second Section 706 Report* ¶ 1, CC Docket No. 98-146 (2000) ("*Second Section 706 Report").*

[15] *See Third Section 706 Report*, App. C, Table 9, CC Docket No. 98-146 (2002) ("*Third Section 706 Report").*

[16] *See* California Wireline Broadband Classification Comments at 28, CC Docket No. 02-33 (filed May 3, 2002); *see also Broadband 2001 Report*, Chart 25 (estimating that only 33% of consumers had a choice of DSL and cable modem services and that 38% had DSL as their only option).

Cable is not generally available in business districts at all; virtually all small business customers of cable are in suburban areas that contain or are immediately adjacent to residences. Thus, "[m]ore than 80 percent of midsize and small businesses are sufficiently close to a telephone-switching office to subscribe to DSL, whereas cable, having started out as an entertainment medium, reaches fewer than 20 percent of such businesses in the United States."[17] Perhaps the best evidence that DSL generally does not face facilities-based competition for small businesses is Bell pricing – the same or similar broadband services provided to businesses are much more expensive than the services provided to residential customers.[18]

The situation is no better for large business services such as ATM and Frame Relay that are provided over high capacity loops and transport facilities. As AT&T has previously explained,[19] self-deployment of these transmission facilities is generally not economic. Mr. Barr makes no attempt to refute this evidence, but simply renews the Bells' claim that they do not control bottleneck facilities because long distance carriers control more than two-thirds of the *retail* market for ATM and Frame Relay.[20] In making this claim, Mr. Barr inappropriately lumps together *both* local *and* interLATA data services, the latter of which most Bells have only recently begun to provide (as they obtain section 271 authority). In the local markets where the Bells have been able to compete, in contrast, they have already parlayed their control over bottleneck facilities into control of over *90%* of the retail ATM and frame services provided to large businesses – clear confirmation of enduring market power.[21] Indeed, the very source that the Bells cite concludes: the "[m]essage[] in the [d]ata [is that t]he RBOCs will continue to dominate" the markets for these services because they control the bottleneck facilities necessary to provide these services.[22]

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[17] *DSL Will Win Where It Matters*, McKinsey & Co. (July 2001).

[18] For example, Qwest offers 256 kbps residential DSL at $39.95, but charges $139 per month for 256 kbps business DSL. *Compare* http://qwest.com/residential/products/dsl/index.html *with* http://www.qdslonline.com/prod/offer.html). Similarly, "T1 and fractional T1 continue to prosper. ILEC salesforces are motivated to sell T1 first and DSL second. . . . The ILECs have done very little to push DSL to small businesses." Yankee Report at 3 (August 2002). Overall, "[e]ven though business subscribers only represent 23% of the total DSL subscribers, they comprise 56% of all DSL revenues in the US . . . . On average a business customer's DSL service will amount to a $200.00 charge monthly." 2002 In-Stat Report.

[19] Reply Comments of AT&T at 165-87, 240-68, CC Docket No. 01-338, (filed July 17, 2002) ("AT&T Triennial Review Reply Comments") ; AT&T ILEC Broadband Dominance Comments at 26-31.

[20] *Barr Broadband Letter* at 4.

[21] AT&T ILEC Broadband Dominance Comments at 23-25.

[22] *See* IDC, *U.S. Packet/Cell-Based Services Market Forecast and Analysis*, 2000-2005, at 34

With this framework, I now turn to address the specific arguments advanced by Mr. Barr.

1. The core *Computer Inquiries* unbundling and nondiscrimination obligations remain necessary and pose no threat to the Bells' ability to provide integrated offerings that combine content and transmission on a deregulated basis. The Commission should retain its core *Computer Inquiries* regulations that require the Bells to provide standalone broadband transmission on a nondiscriminatory basis. Absent such obligations, the Bells would have the incentive and ability to exercise market power over unaffiliated ISPs and content providers that, with few exceptions, have no alternative to the Bells' last mile broadband transport. This is not to say, however, the Commission must retain its entire *Computer Inquires* framework. Rather, the Commission should carefully review its ancillary *Computer Inquiries* regulations and evaluate whether particular regulations that the Bells contend are burdensome remain necessary to prevent the exercise of market power. It must be noted, however, that Bells have identified no such regulations and instead ask the Commission simply to sweep away the entire *Computer Inquiries* framework, an unprincipled result that could not conceivably survive review.

Further, the possibility remains for the *future* elimination of even the core *Computer Inquiries* regulations. The basis of the Bells' market power is the lack of wholesale alternatives for ISPs and the proven inability of the cable/DSL retail duopoly to overcome the Bells' anticompetitive incentives to protect their legacy services. Effective implementation and enforcement of the Act's unbundling obligations that produced vibrant *intra*modal competition such that UNE-based competitive carriers had the ability effectively to serve all ISPs could, for example, reduce the need for the *Computer Inquiries* requirements. The collapse of the data LEC industry, however, makes clear that further work remains to be done to create an environment that would foster intramodal competition on the scale necessary to obviate the need for the *Computer Inquiries* rules, and that the core *Computer Inquiries* requirements must remain in place until effective intramodal competition on the required scale has actually developed. Accordingly, the Commission should work to *strengthen*, rather than, as the Bells urge, eliminate, existing broadband unbundling obligations and establish the conditions that permit sustained data competition that would permit the eventual elimination of the *Computer Inquiries* regime.

Robust intermodal competition among several ubiquitous platforms (as opposed to mere cable/telephone duopolies) could also bring an end to the *Computer Inquiries* regime. The Commission is taking steps to encourage such competition. For example, the Commission recently issued a NOI to study how additional unlicensed spectrum can be made available to permit companies, such as the Cometa joint venture between AT&T, IBM and Intel, to deploy "WiFi" more broadly.[23] The Commission has concluded a series of rulemakings designed to

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(2001).

[23] News Release, *FCC Begins Inquiry Regarding Additional Spectrum For Unlicensed Devices*

make more efficient use of available satellite spectrum and is now working actively on the Spectrum Policy Task Force's proposals for further reforms.[24] The Commission has allocated spectrum for "third generation" advanced wireless services.[25] And the Commission has established a Bandwidth Task Force to coordinate all of its broadband-related efforts to ensure the "greatest efficiency and effect."[26] These efforts to encourage effective and widespread broadband competition from satellite and wireless platforms that today are only marginal players are tremendously important, but will obviously take some time to bear fruit.

The Bells nonetheless seek the immediate elimination of all *Computer Inquiries* rules that apply to broadband. Although Mr. Barr concedes that the Bells' integrated retail broadband Internet offerings have, for all practical purposes, long been provided free of regulation (as Title I information services), he contends that the Bells cannot offer integrated information services *effectively* if they must continue to offer broadband transport to other Internet providers on nondiscriminatory terms. Mr. Barr advances three arguments in support of this "key regulatory principle." Each is flawed.

First, Mr. Barr argues that the existing *Computer Inquiries* obligations are "destructive to incentives to invest in broadband" because they "limit the revenues that telephone companies can earn."[27] Whatever the theoretical merits of complaints against "cost-based" rate requirements – and both the Commission and the courts have consistently rejected such complaints – those arguments plainly can have no force here, because the Bells have set, *and substantially raised*, their DSL transport rates essentially at will, often on as little as one days' notice.[28]

The Bells' real complaint is not with rate regulation but with the core *Computer Inquiries* obligation to offer DSL transport to Internet providers at the *same* rates (and on the same terms), regardless of their affiliation with the Bells. Mr. Barr argues that this basic nondiscrimination requirement prevents the Bells from competing effectively with cable companies by denying the Bells "the ability to differentiate their integrated content services by incorporating innovative and

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(Dec. 11, 2002)

[24] *Third Section 706 Report* ¶¶ 140-47.

[25] Second Report and Order, *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems*, ET Docket No. 00-258 (2002).

[26] *First Section 706 Report* ¶ 106, CC Docket No. 98-146 (1999).

[27] *Barr Broadband Letter* at 4.

[28] Reply Comments of AT&T at 29-30, CC Docket No. 01-337 (filed Mar. 1, 2002) ("AT&T ILEC Broadband Dominance Reply").

unique network-based features into their bundled offerings."[29] Mr. Barr does not identify a single feature or innovation that any Bell has been prevented from deploying as a result of the *Computer Inquiries* nondiscrimination requirement, and the reality is that the Bells have had no trouble at all competing with cable, capturing many millions of customers in only a few years and notwithstanding the Bells' decision to price their DSL services significantly higher than cable alternatives. Of course, any true network-based innovation that the Bells deploy *will* differentiate their offerings from cable, regardless of the continuing existence of the *Computer Inquiries* nondiscrimination requirement. And the Bells retain every incentive to make such investments, because they will benefit from that innovation, regardless whether the DSL service that the customer chooses over cable is a Bell-supplied DSL service or another DSL service provisioned using broadband transport purchased from the Bell.

Further, Mr. Barr's investment incentive arguments are implicitly premised on the assumption that the only broadband investments that matter are Bell broadband investments. In fact, the Bells are not the sole, or even primary, drivers of broadband "innovation." Finished Internet access services typically involve development and management of the actual "information" that flows over the Bell provided loops, an area in which the Bells have plainly been followers, not leaders. It has been ISPs (as well as content providers, technology firms and competitive telecommunications carriers), not the Bells, that have been the leaders in developing the technologies and programs that make the "Internet" what it is today.[30] ISPs and others can likewise be expected to take the lead in developing unique broadband services. These benefits could be lost if the Bells were prematurely permitted to discriminate against unaffiliated ISPs.

Second, Mr. Barr asserts that the underlying market power premise of the *Computer Inquiries* rules is missing in the broadband context, because ISPs can turn elsewhere if they are denied access to Bell networks.[31] As detailed above, that assertion is false. Whether they seek to serve businesses or consumers, information services providers – and the *Computer Inquiries* rules protect *all* information service providers, not just ISPs – generally have *no* choice but the Bells for last mile access. The bottom line is that in a world of such limited alternative suppliers to information service providers, there is clearly insufficient competitive pressure to cause the Bells voluntarily to grant reasonable access to their networks – particularly when this access

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[29] *Barr Broadband Letter* at 4.

[30] Comments of AT&T, Willig Dec. ¶¶ 73-74, CC Docket No. 02-33 (filed May 3, 2002) ("AT&T Wireline Broadband Classification Comments").

[31] *Barr Broadband Letter* at 4. Mr. Barr also claims that the Bells' lack market power with respect to data services provided to large business, but, as explained above, he is wrong on the facts. Moreover, this argument is irrelevant to the *Computer Inquiries* rules given that ATM and frame relay business services generally are provisioned with special access and not *Computer Inquiries* transport.

could only further erode the Bells' profits for second lines and dedicated small business services.

Third, Mr. Barr retreats to the Bells' now well-discredited "regulatory parity" theory that identical outcomes are required, regardless of relevant differences.[32] The Commission has repeatedly ruled that regulatory parity means equality of principles, not necessarily equality of results, and there is now an extensive record of important legal, economic, and technological differences that could justify disparate treatment of cable companies and the Bells with regard to last mile access.[33] But even if these were not enough to support different treatment, that would not mean that the appropriate "same" treatment would be deregulation and the creation of unregulated monopolies or duopolies.

2. *The Bells' Request For A Blanket "Private Carriage" Classification Of Any And All Stand-Alone Broadband Transmission Services That They May Offer Is Flatly Unlawful.* Not content with their requested repeal of their existing obligations to offer unbundled broadband transport on nondiscriminatory terms, the Bells also seek the right to offer such transport to preferred customers outside the Title II framework that would otherwise apply. Mr. Barr argues that all such voluntary offerings should be deemed "private carriage" governed by Title I.[34]

The Commission cannot, as the Bells urge, fabricate a blanket Title II exemption for all stand-alone broadband transmission services – and thereby permit the Bells to offer stand-alone broadband transport as a private carrier service, provided on Bell-imposed terms only to Bell-selected customers. The Bells' networks were built for and have always been operated to provide transmission to any customer who requests it. Common carriage is the wireline rule, and private carriage the rare exception that applies only to ancillary or specialized services. That is

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[32] *Barr Broadband Letter* at 4. Mr. Barr attempts to give his arguments a First Amendment gloss, but that adds nothing. *See id.* at 5. Even if the Bells were not common carriers and exercised the same type of editorial control over content as cable operators, there is a compelling governmental interest in subjecting them to access regulation – they have the incentive and ability to exercise market power.

[33] For the reasons explained above, the Bells have a strong incentive to deny unaffiliated ISPs last mile broadband transport at competitive rates, whereas cable companies have no legacy data line revenues to protect. Moreover, DSL is a mature common-carriage technology while common carriage has not been attempted in the cable context and could raise complex problems. Finally, although it is true that the Commission has, to date, not imposed *Computer Inquiries* obligations on cable companies – but is currently considering such regulation in the ongoing cable modem rulemaking – cable companies are subject to other "sharing" obligations to which the Bells are not subject (and in some instances cable operators must share their networks for free).

[34] *Barr Broadband Letter* at 5-6.

why the Bells have been unable to identify a single precedent that supports their attempt to insulate whole categories of transmission services that are generally demanded and used by large classes of customers from Title II regulation. The Commission has authorized the Bells to offer services on a private carriage basis only in two narrow circumstances: (1) when the Commission determined that the service, despite being tariffed in the past, did not, in fact, comprise or provide telecommunications, and (2) when the Commission determined that a new service should be offered on an individual case basis because it is unique to individual customers and because there is no (or little) general demand for the service.[35] Stand-alone broadband transmission is obviously neither. To the contrary, it is a *basic transmission service* that is (1) generally demanded and used by large classes of customers, (2) has no generally available substitutes, (3) is used to compete with the Bell's own services, and (4) has always been generally offered on a common carrier basis.

3. *The Commission Should Retain Its Core Unbundling Obligations For Broadband Facilities*. The Commission should retain its existing unbundling regulations that permit competitive carriers to lease Bell facilities and provide both voice *and* broadband data services. Any other policy would both violate that Act's core non-discrimination principles and end the prospect of effective voice and data competition. Local entry simply will not be feasible in many areas unless competitive carriers can cover their UNE and other costs from the full range of narrowband and broadband services that the Bells themselves are allowed to provide over those facilities. And absent a viable data offering, competitive carriers will be unable to compete for consumers that are increasingly demanding voice and data services from a single provider over a single line. In this regard, the Commission should clarify that its existing rules require the Bells to provide competitive carriers with effective access to the full functionality of loops when the Bells deploy fiber in the feeder portion of the loop.[36] Absent such a rule, competitive carriers will be walled off from competing for a growing share of customers as NGDLC is deployed more widely in Bell networks.

The Bells position is again that competition should be sacrificed to preserve Bell monopolies. Mr. Barr claims that it follows from the definition of the term "network element" as "a facility or equipment *used in the provision of a telecommunications service*" that unless an *incumbent* local telephone company uses a given facility or feature to provide a "telecommunications service," the incumbent has no obligation to offer that facility or feature on an unbundled basis.[37] But that does not follow at all. The manner in which an incumbent LEC chooses to use its facilities is simply irrelevant to competitive carriers' rights under section

[35] Reply Comments of AT&T at 26-28, CC Docket No. 02-33 (filed Jul. 1, 2002) ("AT&T Wireline Broadband Classification Reply Comments").

[36] *See* AT&T Triennial Review Reply Comments at 187-240.

[37] *Barr Broadband Letter* at 6.

251(c)(3) – as the Commission has repeatedly held.[38] The Act defines "network element" to include facilities used in the provision of a telecommunications service, as well as the capabilities of these facilities, and section 251(c)(3) gives competitive carriers the right to access loops and other unbundled network elements whenever *they* will use those network elements to provide a telecommunications service. Further, it would violate section 251(c)(3)'s requirement that network element access be provided on "nondiscriminatory" terms if competitive carriers were required to pay for the entire loop but denied the ability to use the full functionality of the loop. This plain text reading of the Act is so clear that Verizon's sister-Bells have broken ranks and agree that Verizon's position must be rejected.[39]

Mr. Barr's "policy" arguments fare no better. He claims that the broadband unbundling obligations are unnecessary because the Bells are "minority players" in that "market" and that cable companies have a greater customer base.[40] But, as explained above, the relevant issue here is what *wholesale* alternatives exist for *competitive carriers* that are seeking to offer at retail voice and data services. And there can be no debate that cable operators are not a viable wholesale alternative to competitive carriers because they do not provide the type of facilities and services desired by the competitive carriers. Thus, competitive carriers are captive to the Bells that have little incentive to grant these carriers access that could erode the Bells' monopoly voice and data profits.

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[38] *Local Competition Order* ¶ 995, 11 FCC Rcd. 15499 (1996) ("*Local Competition Order"*). ("We conclude that, if a company provides both telecommunications and information services, it must be classified as a telecommunications carrier for purposes of section 251 . . . . We also conclude that telecommunications carriers that have interconnected or gained access under sections 251(a)(1), 251(c)(2), or 251(c)(3), may offer information services through the same arrangement, so long as they are offering telecommunications through the same arrangement as well."); *Local Competition Order* ¶ 333 (the Act allows new entrants to "offer services that differ from those offered by an incumbent" over leased network elements); *UNE Remand Order* ¶ 327, CC Docket No. 96-98 (1999) ("*UNE Remand Order* ") (concluding that network facilities are "'used in the provision of telecommunications service' in section 153(29)" if they have been or are "customarily employed" for the purpose of providing a telecommunications service).

[39] Qwest Wireline Broadband Classification Comments at 21, CC Docket No. 02-33 (filed May 3, 2002) (acknowledging that "[w]ith respect to UNE rights under section 251(c)(3), the question . . . is whether the *requesting party* is a "telecommunications carrier" and whether the service *it* wishes to provide using the UNE at issue is a "telecommunications service."); BellSouth Wireline Broadband Classification Comments at 18, CC Docket No. 02-33 (filed May 3, 2002) ("[o]nce the CLEC has access to the loop [or other network element,] it could use it to provide telecommunications as well as information services.").

[40] *Barr Broadband Letter* at 6.

In the alternative, Mr. Barr asserts that competitive carriers are not "impaired" in deploying high-capacity loop facilities because they can build their own facilities.[41] AT&T and others have previously demonstrated in great detail why this assertion is contrary to both sound economics and the record evidence. Whether copper, fiber or copper-fiber hybrid, local transmission facilities are quintessential bottleneck facilities because they require enormous sunk costs and are characterized by steep scale economies. In addition, even where competitive supply might otherwise be economic, the Bells benefit from significant right of way, building access, and other first mover advantages.

In this letter, I focus on Mr. Barr's "new" argument that competitive carriers cannot be considered "impaired" given that cable companies have been able to deploy networks that can provide broadband Internet access. As an initial matter, the *USTA* court clearly rejected the notion the Act's "impair" standard necessitated an "essential facilities"-type test.[42] Instead, *USTA* held only that a unbundled network element must have "some degree" of the "characteristics" of a "natural monopoly."[43] And that is why the Bells have elsewhere conceded that competitive carriers are "impaired" without access to facilities that are merely "expensive to duplicate," not "economically infeasible" to duplicate.[44] Indeed, the Bells recognize that "the mere presence of a single competitive facility in a particular market [does not] necessarily preclude[] a finding of impairment in that market."[45]

Accordingly, unless scale economies are sufficiently attenuated that *multiple* carriers can profitably duplicate the facility in question, competitive carriers are impaired without unbundled access to the incumbent's network. Any other rule would be inconsistent with the recognized purpose of the Act to facilitate sufficient competition to drive rates towards costs.[46] There can be no serious argument that competitive telecommunications carriers could hope to duplicate a cable company's broadband entry costs, given the enormous economies of scope that cable

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[41] *Id.* at 7.

[42] *USTA* v. *FCC*, 290 F.3d 415 , 427 (D.C. Cir. 2002).

[43] *Id.* These holdings expressly foreclose Mr. Barr's claim (at 3) that an element must be found to be a natural monopoly before impairment can be found, and that the Act requires a showing that average costs are declining throughout the range of the relevant market, such that an entrant with less than full market scale cannot compete.

[44] SBC Triennial Review Reply at 9, CC Docket No. 01-338 (filed Jul. 1, 2002).

[45] *Id.* at 10.

[46] *UNE Remand Order* ¶ 55 (eliminating unbundling where there is only one alternative to the incumbent carrier would create "stagnant duopolies" that would defeat the Act's objective of "creat[ing] competition among multiple providers of local service that would drive down prices to competitive levels").

operators enjoy between video programming services and high-speed Internet access services (and other services) provided over the same wires.

For these same reasons, the specific proposals proffered by Mr. Barr should be rejected. "Line sharing" *is* necessary because there are *not* "multiple competing platforms" to which data LECs can turn. Regardless of whether they use all copper or deploy fiber in the feeder, Bell loops remain quintessential bottleneck facilities and competitive carriers need the full functionality of the loop to compete. Thus, where the Bells have deployed NGDLC technology, they must provide access to the fiber portion of the loop and associated electronics as part of the "unified" loop.[47]

Unable to show a lack of impairment, Mr. Barr retreats to the argument that UNE obligations must be eliminated because the Bells' need monopoly profits in order to invest in broadband.[48] The Commission should reject this naked plea to exploit consumers.

First, the notion that access regulations are impairing Bell incentives to invest in broadband is contrary to the hard evidence. The Bells have invested substantial sums in upgrading their networks and can now provide DSL to the majority of their subscribers.[49] Further, the evidence shows that the investments necessary to expand the Bells' DSL footprints could be justified solely by the savings achieved with respect to voice services. Finally, the Bells have now conceded both that DSL is earning "dramatic" increases in profits and can be deployed with "little" incremental cost.[50]

With these facts, there can be no claim that unbundling at TELRIC-based rates impedes the deployment of DSL. And presumably that is why the Bells have instead chosen to talk about how unbundling rules could impair future broadband services such as fiber-to-the-home ("FTTH"). But whether TELRIC is or is not sufficient to handle future investments in FTTH networks that are, at a minimum, years down the road, is not germane to whether competitive carriers should *today* be given access to the type of broadband networks that have been and are now being deployed, and where there can be no claim that TELRIC has materially impeded Bell investment.

[47] AT&T Triennial Review Reply Comments at 187-240. In this regard, the Bells' objection to allowing competitive carriers to collocate in remote terminals where NGLDC has been deployed, *Barr Broadband Letter* at 7, is a red herring. No such collocation is required under the type of access arrangements being proposed by AT&T and other competitive carriers.

[48] *Barr Broadband Letter* at 2-3.

[49] AT&T Triennial Review Reply Comments at 79-80.

[50] Kahn- Taylor Dec., RM No. 10593, at 14 .

This is particularly true given that the Bells have, in fact, made *no* commitment to increase broadband investment should they get the relief that they seek. Indeed, even where they have committed to make substantial broadband investments, the Bells have a history of reneging on those promises.[51] Further, as the independent economists who testified at the Commission's October 7, 2002 *En Banc* explained, FTTH is not being offered today because the costs to deploy it are enormous and the consumer demand and willingness to pay for its enhanced capabilities do not now exist.[52] These same economists made clear that this is not a "chicken-and-egg" problem. "There are 24 million people who have access to [broadband] at home, plus countless millions more who have access to it at work or at school. And so if there is some great application that's ready to go, people can find it. That's a big enough market out there for people to make the application for."[53]

But even if it were the case that the Bells stood ready and willing to build FTTH, TELRIC does not impair these future investments. Although the Bells continue to deride TELRIC as confiscatory, those arguments have been squarely rejected by the Commission and the Supreme Court. As the Supreme Court held in *Verizon*, "TELRIC rates leave plenty of room for differences in the appropriate depreciation rates and risk-adjusted capital costs depending on the nature and technology of the specific element to be priced."[54] This is also the view of Verizon's principal economist, Dr. Alfred Kahn, who testified in these proceedings that "TELRIC can be sufficiently flexible to accommodate investment risks in a way that is approximately correct economically."[55]

The Bells' claim that TELRIC is a one-way bargain that reduces potential upsides, but leaves ILECs exposed to downsides, is economic nonsense. Because TELRIC is *forward-looking*, TELRIC-based rates in this context would be calculated by including the potential risk that consumers would not want to purchase services provided over the upgraded facilities. Thus, although the competitive carriers have the right (a "call option") to buy the Bells' upgraded loops, they must do so at a price that fully compensates the incumbent for its prospective risk.[56]

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[51] *Ex Parte* Letter from C. Frederick Beckner III to Marlene Dortch, CC Docket Nos. 01-338, at 2 (Dec. 6, 2002).

[52] *Id.* at 4-5.

[53] *Id.* at 5.

[54] *Verizon* v. *FCC*, 122 S. Ct. 1646, 1678 (2002).

[55] Verizon Triennial Review Reply, Kahn-Tardiff Reply ¶ 40 n.52 (*citing* Reply Brief for Petitioner FCC in *Verizon Communications v. FCC*) (hereinafter "FCC *Verizon* Reply Br.").

[56] AT&T Triennial Review Reply, Willig Reply Dec. ¶ 88; *id.*, Clarke-Donovan Reply Dec. ¶ 35. That said, economics predicts that unbundling can *decrease* the Bells' business risks in deploying broadband networks because the Bells would not only benefit from the retail customers they can convince to sign up for FTTH, but also from traffic and revenues generated

Similarly, if a competitive environment makes it more likely that an incumbent's capital will be devalued (say by entry or by more rapid technical progress), TELRIC depreciation will reflect this.[57]

Finally, Mr. Barr's arguments ignore the fact that the Bells are not the sole, or even primary, drivers of broadband "innovation." Authorizing multiple firms to provide these facilities inherently leads to greater investments than would occur if these rights were limited to the Bells alone.[58] More specifically, the provision of a broadband service to a customer requires the attachment of electronic equipment (*e.g.*, DSLAMs and packet switches) to broadband-capable loops and, with narrow exceptions, the Commission's rules require that competitive carriers self-provision this electronics equipment. There is, therefore, no question that unbundling obligations *promote* investment in the electronic equipment and associated facilities required to transform voice-grade loops into broadband by allowing these investments to be made by competitive carriers as well as incumbents. The massive investments made by competitive carriers would be choked off entirely if unbundled access to loops was curtailed, because competitive carriers would have no way to access broadband customers. This reduced competition would, in turn, give the Bells substantially less incentive to invest in such electronics themselves or to offer innovative new services.

4. *The Commission Should Retain Existing Separate Affiliate Obligations.* The Bells also seek repeal of an important structural safeguard, the ban against shared operation, installation and maintenance ("OI&M") services between a Bell and its interLATA services affiliates, complaining that this rule is costly, has "no corresponding benefit," and requires the Bells to operate "one interLATA and one intraLATA" service.[59]

The ban on shared OI&M flows directly from section 272 of the Act that and is based on sound policy. Section 272 provides that once the Bells obtain interLATA authorization, such

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by CLEC "wholesalers." *Id.*, Willig Reply Dec. ¶ 88.

[57] The Bells' attacks against TELRIC in connection with the deployment of new FTTH is extremely ironic. The Bells' historic objection to TELRIC is that it denies them recovery of their *historic book costs*. But this objection has no application at all to the hypothetical future FTTH systems that Mr. Barr refers to here – or to anything else that is actually a totally "new" facility. Assuming the Bells act efficiently (as they claim that they will) and deploy state-of-the-art equipment and facilities, their TELRIC costs of the additional equipment used to deploy a FTTH system would be approximately the same as their book costs. AT&T Triennial Review Reply, Willig Reply Dec. ¶ 88.

[58] *See* Letter from William J. Baumol, B. Douglas Bernheim, Robert E. Hall, William Lehr, John W. Mayo, Janusz A. Ordover, Frederick R. Warren-Boulton & Robert D. Willig to Hon. Donald L. Evans *et al.* (Dec. 12, 2001).

[59] *Barr Broadband Letter* at 8.

services may be provided only through a separate affiliate that "operate[s] independently" from the BOC.[60] The Commission determined "that allowing the same personnel to perform the [OI&M] services associated with a BOC's network and the facilities that a section 272 affiliate owns or leases from a provider other than the BOC would create the opportunity for such substantial integration of operating functions as to preclude independent operation, in violation of section 272(b)(1)."[61] In particular, the Commission stressed that section 272(b)(1)'s "operate independently" requirement barred sharing OI&M services, in part, because such shared service arrangements "would *inevitably* afford access to the BOC's facilities that is superior to that granted to the affiliate's competitors," and "would create substantial opportunities for improper cost allocation."[62] In the absence of the shared OI&M ban, therefore, the Bells could very easily abuse their enduring power over local bottleneck facilities to their broadband rivals harm through discrimination and cost misallocation. For these reasons that the Commission has already repeatedly rejected Bell attempts to eliminate the ban on shared OI&M.[63]

Further, there is no basis for Mr. Barr's claims that, even if the ban on joint OI&M could apply to narrowband services, it makes "absolutely no sense when applied to broadband."[64] To the contrary, the Commission has determined that structural safeguards like the prohibition on shared OI&M are even *more* necessary for broadband and other advanced services. Thus, when the Commission decided, in merger proceedings involving the Bells, that it was appropriate to require the Bells to provide advanced services through a separate affiliate, the Commission found that the risks that the Bells will discriminate against their rivals are the greatest for new and advanced services, because there is little or no track record by which to gauge the Bell's performance.[65] Because the Bells control bottleneck facilities needed by rival broadband

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[60] *See* 47 U.S.C. § 272(b)(1); 47 C.F.R. § 53.203(a); *Non-Accounting Safeguards Order* ¶¶ 158-70, CC Docket No. 96-149 (1996) ("*Non-Accounting Safeguards Order").*

[61] *Non-Accounting Safeguards Order* ¶ 163.

[62] *Id.* (*citing BOC Separations Order*, 95 F.C.C. 2d 1117, 1144 (¶ 70) (1983)).

[63] *Non-Accounting Safeguards Third Order On Reconsideration*, ¶ 20, CC Docket No. 96-149 (1999) (rejecting the Bells request that the Commission reconsider the OI&M rule, finding that the Bells' proposal would "create a loophole around the separate affiliate requirement" and would provide for such "substantial integration of these essential functions . . . that independent operation would be precluded").

[64] *Barr Broadband Letter* at 9.

[65] *SBC-Ameritech Merger Order* ¶ 220, CC Docket No. 98-141 (1999) ("*SBC-Ameritech Merger Order")* ("With the increased network complexity, and the possibility for new types of discrimination, comes also an increased difficulty in detecting discrimination. In such a situation, past experience with the interconnection of plain vanilla, or POTS service, becomes increasingly less useful as a regulatory tool for preventing, detecting, and remedying discrimination"); *id.* ¶ 196 (BOC discrimination is "particularly acute with regards to advanced

providers, they retain in those markets – as in the traditional long distance and other narrowband markets – strong incentives and increased ability to misallocate costs and to discriminate against rivals. The ban on shared OI&M, as applied to broadband services, is a critical safeguard to help detect and prevent such misconduct and harm to broadband markets.[66]

Mr. Barr also argues that the Commission should eliminate "company-specific requirements" like those imposed upon Verizon and SBC in merger proceedings.[67] There is no basis to this claim. The "requirements" that Mr. Barr claims are unnecessary are in fact express merger conditions that the Bells themselves proposed and that the Commission agreed to in order to approve LEC mergers that were otherwise unlawful and harmful to the public interest.[68] The Commission expressly determined that *only* the existence and implementation of "the full panoply of conditions" proposed by the Bells could allow the Commission to approve these mergers.[69] In particular, the merger condition cited by Mr. Barr relating to the separate affiliate for advanced services was necessary to "counterbalance [the merged companies'] increased incentive to degrade services and facilities furnished to competitors" and to "make engaging in anticompetitive misconduct more difficult."[70] As the Commission explained, the merger condition that Mr. Barr now seeks to eliminate was designed to "provide [the Bells'] competitors substantial benefits" by creating a "structural mechanism to ensure that competing providers of advanced services receive effective, nondiscriminatory access to the facilities and services . . . that are necessary to provide advanced services."[71] Thus, regardless of the costs that Mr. Barr claims (without support) that Verizon has incurred as the result of these requirements, the merger conditions were a critical part of the bargain allowing the LECs' mergers to proceed. Unless Mr.

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or customized access services for which detection of discrimination is most difficult").

[66] These considerations by themselves make clear that the OI&M rule should be retained even if it were true that the ban caused the Bells to incur extra expenses. But there is in all events no basis for Mr. Barr's overblown and unsupported assertions that the OI&M ban will cause Verizon to incur hundreds of millions of dollars in costs. *Barr Broadband Letter* at 8. Verizon has been making these *ipse dixit* claims in other proceedings, but tellingly has refused to provide backup support (which it admits is available), claiming that such information is confidential. In these circumstances, these cost claims are entitled to no weight. *See* Letter to Marlene Dortch from David Lawson, CC Docket No. 96-149 & Declaration of Lee Selwyn (attached thereto) (filed Nov. 15, 2002).

[67] *Barr Broadband Letter* at 9.

[68] *See SBC-Ameritech Merger Order* ¶ 348-349; *Bell Atlantic-GTE Merger Order* ¶ 246-247, CC Docket No. 98-184 (2000) ("*Bell Atlantic-GTE Merger Order").*

[69] *E.g.*, *id.* ¶¶ 246-47.

[70] *Id.* ¶ 260.

[71] *Id.* ¶ 261.

Barr proposes to undo these mergers and the accompanying harm to competition that they have caused, there is no basis for the Commission to remove these merger conditions.

5. *The Commission Lacks Authority To Engage In The Broad Preemption Urged By The Bells*. Lastly, Mr. Barr urges the Commission to preempt the states from exercising their core jurisdiction over local services and facilities. In particular, Mr. Barr urges that the Commission prevent state commissions from "unbund[ling] packet switching equipment" and from "allocat[ing]" the costs of broadband facilities in determining intrastate revenue requirements.[72] The "relief" requested by Mr. Barr squarely violates the Act.

In previous letters, AT&T has explained in detail why the states retain their core authority to impose unbundling obligations.[73] The Act is explicit that the Commission's unbundling rules operate only to establish a national *floor* that preempts state laws that would have the effect of denying CLECs the rights to access the national minimum list of network elements or that would otherwise impose barriers to competitive entry. Further, the Act expressly authorizes state commissions to establish and enforce additional requirements under state law so long as they do not operate as barriers to local competitive entry.

Several interrelated provisions of the Act establish this. First, the only provision of the local competition portion of the Act that expressly gives the Commission authority to "preempt" state law is section 253(d). It bars only state laws that erect "barriers" to entry and, by definition, has *no application* to state laws that go "too far" in granting unbundling rights.[74] Second, sections 251 and 252 of the Act clearly set up this Commission's regulations as minimum national floors that apply only if the parties *elect* to be governed by them, and they give state commissions authority to establish additional requirements under federal law when they arbitrate interconnection agreements, and under state law in all circumstances.[75] In contrast, the Bells' argument that *all* additional state unbundling obligations are preempted simply reads section 251(d)(3), which expressly preserves the right for states to impose additional access obligations, out of the Act. The Act therefore outlaws only state measures that would prevent or impede the use of network elements to provide competing services, *not* provisions that would support the Act's goal of "eliminat[ing] the monopolies enjoyed by the inheritors of AT&T's local franchises . . . as an end in itself" and "giv[ing] aspiring competitors every incentive to enter local retail markets, short of confiscating the incumbents' property."[76]

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[72] *Barr Broadband Letter* at 9-10.

[73] *See, e.g., Ex Parte* Letter from James Cicconi to Chairmen Powell and Commissioners Abernathy, Copps and Martin, CC Docket 01-338 (Nov. 13, 2002).

[74] *Id.* at 6.

[75] *Id.* at 6-7.

[76] *Verizon*, 122 S. Ct. at 1646, 1654, 1661.

Mr. Barr is likewise wrong in arguing that the states only have authority over narrowband services. As an initial matter, Mr. Barr's suggestion that all broadband services are interstate services is plainly wrong. Many broadband services are provided solely on a local basis. For example, the Bells have for years provided intrastate ATM and frame relay services that utilize high-capacity loops and transport facilities.[77] Thus, the state commissions have full authority to decide how to allocate the costs and revenues of these broadband services when regulating retail local service rates.

Mr. Barr is correct that many broadband services have an interstate component. But it does not follow, as Mr. Barr suggests, that there are not common costs between local services and interstate broadband services. To the contrary, the Bells' broadband services are generally provisioned over the same "broadband" facilities used to offer narrowband, local services.

Thus, at bottom, Mr. Barr is arguing for a broadband exception in which *all* of the costs of common facilities that can be used to provide both local services and interstate broadband services must be recovered from local subscribers. If the Commission were to follow Mr. Barr's recommendation, it would effectively codify a cross-subsidy in which captive local customers were forced to subsidize interstate broadband services provided by the Bells. Not only would this be poor policy, it would also flatly violate section 254(k)'s express prohibition on such cross-subsidies: "[t]he Commission, with respect to interstate services, and the States, with respect to intrastate services, shall establish any necessary cost allocation rules, accounting safeguards, and guidelines to ensure that services included in the definition of universal service bear not more than a reasonable share of the joint and common costs of facilities used to provide those services."[78]

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[77] *See* 47 U.S.C. § 152(b) ("[N]othing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier").

[78] 47 U.S.C. § 254(k).

In sum, the Commission should continue to promote broadband through reasoned decisions that adhere to the law and reflect actual marketplace conditions, not the Bells' fantasy world in which market power can be ignored. *De*regulation is an entirely inappropriate response where market power abuse remains a real risk, and premature deregulation of the Bells' broadband services would be an enormous step backwards, that would retard, rather than promote, the deployment of broadband to all Americans. One electronic copy of this notice is being submitted to the Secretary in accordance with section 1.1206 *et seq.* of the Commission's rules.

Sincerely,

/s/ David Lawson

David L. Lawson

cc: J. Carlisle
M. Carey
B. Olson
C. Carpino
C. Libertelli
M. Brill
D. Gonzales
J. Goldstein
L. Zaina
J. Rogovin